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No. 87-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ROBERT WORTHINGTON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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September, 1987

QUESTIONS PRESENTED

I

Whether a defendant can be properly convicted for a violation of 18 U.S.C. Section 1001 on a charge that he illegally "did make and use false writings and documents knowing the same to contain false, fictitious, and fraudulent statements," when the only writing upon which the defendant was convicted was a post-dated and conditional check, signed by a third party and upon which defendant's name did not appear, drawn upon a non-existent bank?

II

Whether the decision of the United States Court of Appeals for the Second Circuit is contrary to Williams v. United States, 458 U.S. 279, 102 S.Ct. 3088, 73 L.Ed.2d 767 (1982)?

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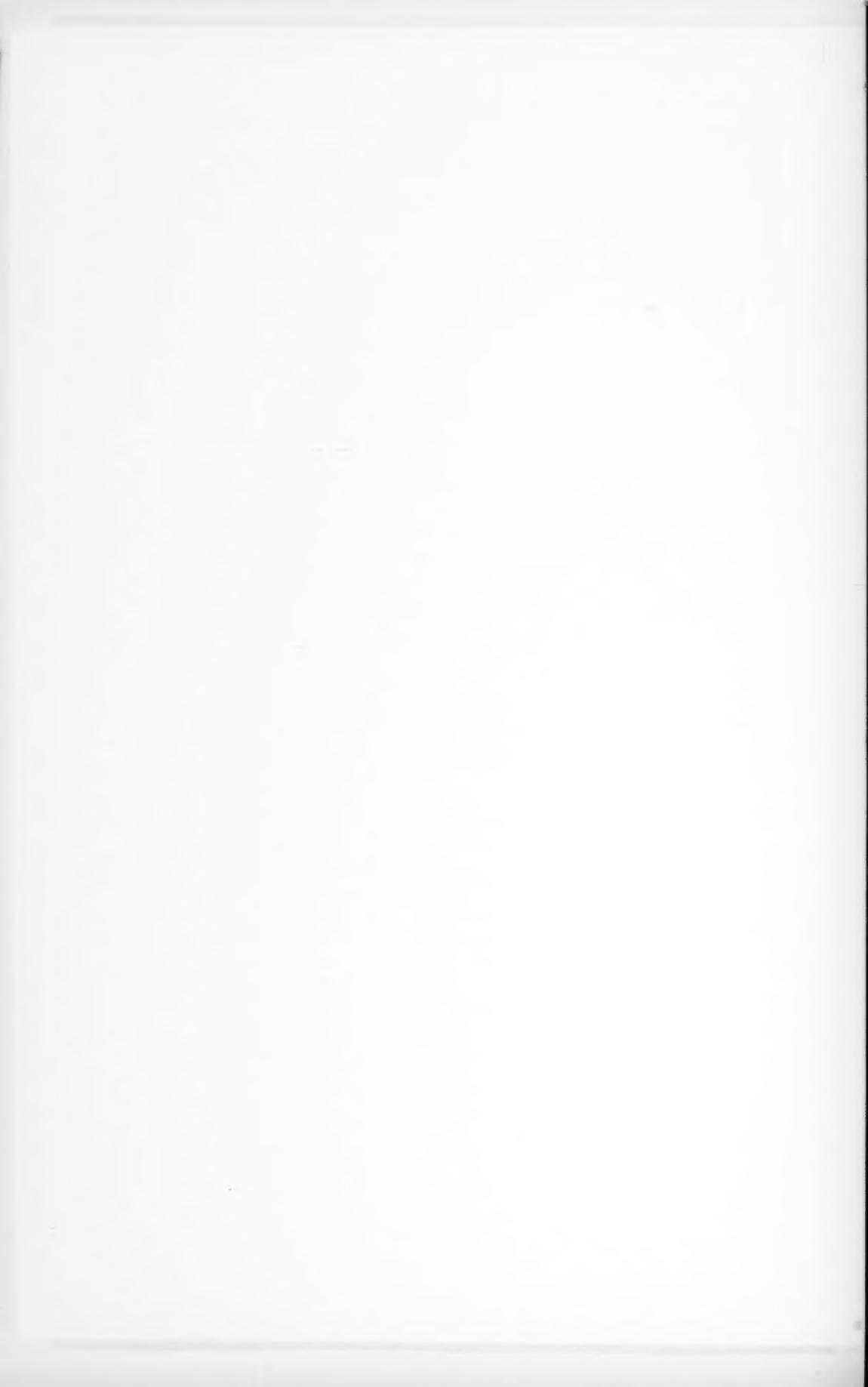
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1987

No.

ROBERT WORTHINGTON,
Petitioner,
vs.
UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

The Petitioner herein is Robert Worthington. Petitioner prays that a Writ of Certiorari issue to review the judgment and opinion of the United States

Court of Appeals for the Second Circuit entered in this proceeding on June 30, 1987, which affirmed the judgment of conviction in the United States District Court for the Southern District of New York (Cannella, J.) for violation of 18 U.S.C. Section 1001.

OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit is not reported and appears in Appendix A hereof. (App. A, 1a-10a). The Petitioner was convicted by a jury in the United States District Court for the Southern District of New York and as such there is no opinion of the District Court.

JURISDICTION

The judgment and opinion of the

United States Court of Appeals for the Second Circuit was entered on June 30, 1987, affirming the conviction of the Petitioner. On August 25, 1987, Justice Marshall signed an order extending the time for filing a petition for a writ of certiorari to and including September 28, 1987.

This Petition for Certiorari was filed within the applicable time period after the opinion of the United States Court of Appeals for the Second Circuit. The Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

I

Whether a defendant can be properly convicted for a violation of 18 U.S.C. Section 1001 on a charge that he

illegally "did make and use false writings and documents knowing the same to contain false, fictitious, and fraudulent statements," when the only writing upon which the defendant was convicted was a post-dated and conditional check, signed by a third party and upon which defendant's name did not appear, drawn upon a non-existent bank?

II

Whether the decision of the United States Court of Appeals for the Second Circuit is contrary to Williams v. United States, 458 U.S. 279, 102 S.Ct. 3088, 73 L.Ed.2d 767 (1982)?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves an interpretation of Title 18, United States Code, Section

1001, which provides in pertinent part:

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully . . . makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

The Petitioner Robert Worthington appeals from a judgment of the United States Court of Appeals for the Second Circuit, entered on June 30, 1987, affirming a conviction entered in the United States District Court for the Southern District of New York on December 19, 1986, following a five-day jury trial before the Honorable John M. Cannella, United States District Judge.

The Petitioner was indicted in 1986, Indictment #S 86 Cr. 573, on three

counts. The first count charged the Petitioner with use of the interstate wires in furtherance of a scheme to defraud, in violation of Title 18, United States Code, Section 1343. The second and third counts charged the Petitioner with making and using false documents, these being checks submitted to the Internal Revenue Service, though the Petitioner allegedly knew that the banks on which the checks were drawn were nonexistent, in violation of Title 18 U.S.C. Section 1001. Count II involved a check of \$130,000 submitted to the IRS on July 1, 1981. Count III involved a check for \$94,000 on the International Bank of San Antonio and submitted to the IRS on July 27, 1981.

The trial court denied a motion to dismiss the second and third counts on the ground that the alleged conduct did

not constitute a violation of 18 U.S.C. Section 1001.

After trial the jury acquitted the Petitioner on Count I, the wire fraud count, convicted him on Count III, and announced itself unable to reach a verdict on Count Two, which was then dismissed with the consent of the government. On December 19, 1986, Judge Cannella sentenced the Petitioner to the maximum allowed under the statute, five years and a \$10,000 fine, for his conviction under Count III. The Petitioner is presently serving his sentence.

STATEMENT OF FACTS

This case has its genesis in financial troubles of a corporation known as Technassociates, Inc., a data-processing and management consulting firm

based in Washington, D.C. Peter Ythier and Marvin Zentner, the owners of Technassociates, testified at trial that in June, 1981, Technassociates was experiencing serious cash-flow problems, and that a business acquaintance referred them to Worthington for possible assistance in obtaining a line of credit. (Tr. 44.46, 136-41). One of the most pressing financial problems facing Technassociates was the paying of past due Form 941 employer taxes to Internal Revenue Service.

In the Government's case in chief, Zentner testified to a series of telephone conversations he had with the Petitioner in which Worthington told him that he had "a number of backers" who might be willing to provide a line of credit for Technassociates; that for a fee Worthington could arrange a line of

credit for Technassociates, and that, pending receipt of that line of credit, Worthington, or his backers, or somebody he was not certain of, would advance a sum of money for payment of then then past due back taxes owed by Technassociates to the IRS. (Tr. 140-42).

Zentner also testified that on July 1, two individuals arrived at Technassociates bearing a letter of introduction from Worthington which described them as "situation analysts" employed by a financial consulting company owned by Worthington, American Internax Planning. (Tr. 142-44). Zentner testified that after a brief inspection of the company's records, he turned over a check from Technassociates to Worthington's representatives for \$2200. (Tr. 143-44). Along with the

check, Zentner testified that he presented to Worthington's representatives a letter summarizing and accepting the agreement for financial assistance to Technassociates from American Internax Planning. (Tr. 50-51, 144).

Ythier testified that on July 2, 1981, he travelled to New York, where he met with Worthington at a midtown restaurant. (Tr. 53). At this meeting, Ythier testified that Worthington allegedly produced for him an IRS counter receipt showing that a check for \$130,000 had been presented to the IRS on behalf of Technassociates. (Tr. 53-54). Ythier, in turn, gave Worthington two check totalling \$16,800. (Tr. 55). In addition, Worthington and Ythier both signed a contract formalizing their agreement. Worthington denied ever

writing a check to the IRS in behalf of Technassociates for \$130,000, and in return receiving a counter receipt from the IRS, and the jury believed him when they acquitted him on this count, which was Count II of the indictment.

Several weeks later, a second installment of Form 941 taxes in the amounts of \$94,600 fell due for Technassociates. Ythier testified in the government's case that Worthington agreed to advance the necessary funds in exchange for the payment of an additional fee of \$15,000. (Tr. 58-59). A short time later, Technassociates received a second IRS counter receipt, purportedly from Worthington's company American Internax Planning, showing that the back taxes had been paid. (Tr. 59). In the fall of 1981, the IRS notified Technassociates that the \$130,000 check

that had been submitted on its behalf was drawn on a nonexistent bank and returned the check to Technassociates. (Tr. 61, 159-60). A month later, the IRS returned the check for \$94,600 to Technassociates with the notification that it, too, had been drawn on a nonexistent bank. (Tr. 63). No line of credit for Technassociates was ever established as a result of the efforts of Mr. Worthington and his company, although meetings with several banks were set up by the Petitioner for both Ythier and Zentner. (Tr. 65-70, 123-25, 156-59, 162-63). In addition, Ythier testified that the Petitioner did prepare some financial documents concerning Technassociates and presented them to a bank. (Tr. 119). Ythier also testified that he met with an individual who was put in touch with him by the Petitioner for the purpose of

discussing financing of his business. (Tr. 130).

In addition to Ythier and Zentner, the government called an IRS representative and a document examiner. The IRS representative described the procedure for over-the-counter payment of taxes; identified the two payment vouchers in evidence as reflecting payments made over the counter in Manhattan; and identified the markings on the fictitious checks as reflecting the checks having been sent by the IRS to numerous clearinghouses in an effort to locate the non-existent banks. (Tr. 181-85).

The document examiner testified that the two fictitious checks were typed on different typewriters, and that the typewriting on the second check, for \$94,600, had similar characteristics to

the typewriting on Worthington's letters to Technassociates in that the two were the same typeface and exhibited common defects. (Tr. 195-96). However, he was not able to state with a certainty that the typing on the second check "matched" the typewriting on Worthington's letters to Technassociates. (Tr. 196).

The second installment of form 941 taxes owed to the government, which formed the basis for Count III, which was the only count upon which the Petitioner was convicted, was for \$94,600. This was purportedly paid to the IRS by the delivery to it of a third party check, signed by someone who was never identified, in an indecipherable handwriting. The name of the Petitioner does not appear anywhere on the check. The check, which was Government exhibit 15 at trial, was in fact drawn upon a

non-existent bank. The reverse side of the check recited the following:

This item represents a loan to Technassociates, Inc. to be paid to I.R.S. under conditions and agreements elsewhere determined. This item not to be deposited until three days from date.

Though the language, "pay to the order" appears below this writing, there was no endorsement by Technassociates, nor is there any indication as to who made the payee by endorsement.

Both Ythier and Zentner testified that Technassociates received an IRS payment voucher stating that the outstanding bill to the IRS had been paid. On direct Ythier testified in the most general terms about the origins of this voucher:

Q. From who did you receive that?

A. To the best of my recollection, that came in the mail, but don't quote me on it.

Q. Who mailed it to you, sir?

A. It came from American Internax Planning.

(Tr. 59). Ythier testified on cross-examination that he was not sure whether this was received in the mail or in person. (Tr. 108).

Zentner, the Vice-President of Technassociates, did not testify that proof of payment for the second payment had been received from the Petitioner. Rather, he testified as follows:

Q. Did you ever receive proof of payment from Mr. Worthington for that second payment?

A. Again, we got an IRS counterreceipt and I think a little adding machine tab that was attached to it.

(Tr. 156).

The Petitioner sought to suggest, through the cross-examination of Ythier and Zentner, that Ythier, and not the Petitioner, had actually submitted the fictitious checks to the Internal Revenue

Service, and that Ythier had tricked Zentner into believing that Worthington was the culprit. (Tr. 172). The Petitioner testified that Ythier was in New York on or about each of the days that the fictitious checks were submitted to the IRS, that Ythier had access to Worthington's typewriter, and that Worthington was at the dentist on the date and time that the second check was submitted to the IRS. (Tr. 243-44, 246, 262-63). The Petitioner positively denied that he had submitted any checks to the IRS on behalf of Technassociates or that he had ever presented any counter receipts or IRS payments vouchers to Technassociates. He also testified that the money he had received from Technassociates was in part a fee for his successful efforts to prevent Technassociates from being summarily

dropped by its factor--pursuant to an agreement the Petitioner had made with Ythier at a meeting at which Zentner was not present--and in part a fee for his efforts to obtain a line of credit for the company. (Tr. 224-34, 238-39, 259-59, 264).

As the Second Circuit summarized, "there is no direct evidence that appellant signed the fictitious check or submitted it since, as noted, the signature on the check was illegible, and the person who submitted it over the IRS counter was not identified at trial."

United States of America v. Worthington, ___ F.2d ___, Slip opinion, p. 4218 (2nd Cir. 1987). Notwithstanding the lack of direct evidence the Second Circuit affirmed the Petitioner's conviction and sentence as to Count III of the indictment.

REASONS FOR GRANTING THE WRIT

The Court of Appeals holding that the designation of a non-existent bank as the drawee of a check constitutes a "statement", as that term is defined for purposes of a criminal prosecution under 18 U.S.C. Section 1001, is contrary to this Court's holding in Williams v. United States, 458 U.S. 279, 102 S.Ct. 3088, 73 L.Ed.2d 767 (1982).

The decision by this Court in Williams took the federal government out of the business of prosecuting individuals for "bad checks." Williams involved a conviction under 18 U.S.C. Section 1014 that proscribes, inter alia, knowingly making a false statement to a bank insured by the Federal Deposit Insurance Corporation (FDIC) in order to

obtain credit.¹ Williams was convicted of engaging in a practice commonly known as check-kiting, i.e., writing checks unsupported by sufficient funds and depositing them in banks insured by the FDIC.

In reversing William's conviction, this Court stated that the petitioner could not be found guilty of making a

1 The parties essentially stipulated below, and the Court of Appeals agreed, that the holding in Williams could not be distinguished because it involved an indictment under 18 U.S.C. Section 1014 rather than a prosecution under 18 U.S.C. Section 1001. As the Court of Appeals noted,

But for the submission of the check to the IRS rather than a FDIC-insured bank, the appellant might have been prosecuted under Section 1014. Cf. United States v. Waechter, 771 F.2d 974, 978-79 (6th Cir. 1985) (applying Williams in a case brought pursuant to 18 U.S.C. Section 1010);

(Ap. A, 9a). See also, United States v. Elliott, 689 F.2d 178, 180-81 (10th Cir. 1982) (applying Williams in case brought pursuant to 18 U.S.C. Section 645(a)).

false statement "for a simple reason: technically speaking, a check is not a factual assertion at all, and therefore cannot be characterized as "true" or "false." Id., 458 U.S. at 284. (Emphasis added). Although conceding that this description of a check was a "technical one," it is a description, nevertheless, that emanates from the highest court in the land and which is binding on the courts of appeals. Even though Justice Blackmun attempted to buttress this argument with other arguments, such as the rule of lenity, the fact that this conduct was already proscribed by state law, and the fact any other result would make every bounced check into potentially a federal offense, this Court's ruling in Williams rests entirely on its definition of a check for federal statutory purposes.

This Court's decision in Williams acts as an absolute bar to the use of Sections 1001 and 1014 to prosecute individuals for worthless or bad checks, regardless of how the check may be said to be worthless. A check drawn on an existing bank, but lacking funds to satisfy it, is just as worthless as a check that is drawn on a non existing bank. The holding in Williams does not attempt, nor does it lend itself, to making distinctions between good worthless check and bad worthless checks. A bad check is a bad check. It may be actionable under some state law criminal statute, but after Williams, "a check is not a factual assertion", id., 458 U.S. at 284, and therefore can not be the predicate for a fraud prosecution under either 18 U.S.C. Section 1001 or 1014.

Any attempt to limit the Williams

holding to cases solely where the check is "bad" because it is drawn on an account that lacks sufficient funds, as the court of appeals did below, and not because it is "bad" for other reasons, is to ignore the broad language used by the majority in Williams. This argument assumes, incorrectly, that Williams was a case about inadvertently bounced checks. As Justice Marshall pointed out in his dissent in Williams, the defendant there was no careless bookkeeper:

This is not a case in which a defendant, through careless bookkeeping, wrote a check on an account containing insufficient funds. Nor is this a case in which a defendant wrote a check on an account containing insufficient funds with the good-faith intention to deposit in that account an amount that would cover the check before it cleared in the normal course of business. Rather, this case clearly involves fraudulent conduct. Petitioner Williams engaged in an intentional check-kiting scheme. He misled the first bank into honoring his worthless, or virtually worthless, check and extending him

immediate credit. This extension of credit enabled him to "play the float" and cover that check by misleading another bank into extending him credit on an equally worthless check. In effect, Williams was able to obtain interest-free extensions of credit. Williams, who was a bank president, does not, nor can he, make any credible argument that he was unaware that his conduct was wrongful.

Williams, 458 U.S. at 292-93. See also, Id., 458 U.S. at 281, n. 1, 304.

If the check in Williams could not be considered the making of a false statement because a check is not a factual assertion at all and therefore cannot be characterized as true or false, then likewise the check at issue sub judice is not a factual assertion at all and therefore cannot be characterized as true or false. That the false information in the instant case is the name of the bank as opposed to the amount of the check is, given the broad holding

of Williams, a distinction without a difference.

In reaching the result it did, the court below disregarded a line of cases that have given Williams the broad reading that Petitioner submits should be applied in the instant case. In United States v. Elliott, 689 F.2d 178 (10th Cir. 1982), the Tenth Circuit reversed a conviction under 15 U.S.C. Section 645(a) for making a false statement to the Small Business Administration because the knowing submission of a worthless and fictitious check, signed by a third party, on which defendant's name did not appear, was not a false statement within the meaning of the statute. The court in Elliott specifically relied on Williams for the proposition that a "bad check" is not a false statement under either 18 U.S.C.

Section 1014 or 15 U.S.C. Section 645(a).

The parallels between Elliott and the case sub judice are striking. In both, the defendant made an unsuccessful motion to dismiss the indictment on the ground that it did not allege conduct which was prohibited by federal statute--the making or using of a false writing or document containing a false statement. In both, the check was on a form. In both, the check was signed by a third party other than the defendant. That the particular alleged falsity is different does not alter the result. A check, according to Williams, is not a factual assertion "at all" and cannot be characterized as true or false. What is important in this analysis is not what is on the check but that it is a check and the fact that the Supreme Court has decided that "bad" checks cannot be

prosecuted under the particular federal fraud statutes at issue in these cases.

A similar result was reached in United States v. Frankel, 721 F.2d 917 (3rd Cir. 1983), which also involved a check-kiting scheme. The court in Frankel extended the reasoning of Williams when it upheld a district court's dismissal of an indictment for mail fraud based on the implied representation made in passing a check written against insufficient funds. The court was careful to emphasize that, "[t]he presentation of a check is not a representation or statement of any kind." Frankel, 721 F.2d at 919. See also, United States v. Rafsky, 803 F.2d 105, 108 (3rd Cir. 1986); United States v. Waechter, 771 F.2d 974, 978-79 (6th Cir. 1985); United States v. Slocum, 695 F.2d 650, 654 (2nd Cir. 1982).

The case of United States v. Krown, 675 F.2d 46 (2nd Cir. 1982), also involved the use of checks drawn on non-existent banks. In Krown the defendant was convicted of various counts of fraud involving financial instruments issued by fictitious offshore banks. The prosecution was brought under 18 U.S.C. Section 1014. Although the conviction was affirmed, there was a very important distinction between the case sub judice and Krown. In Krown, unlike here, the checks at issue were purported to be certified checks. This status distinguishes Krown from the case at bar.

As the court said:

It would seem clear that a fraudulent certified check can be a false statement within the meaning of Section 1014. Such a check constitutes a representation that the check has been accepted by the drawee bank and will be paid upon presentation.

Id., 675 F.2d at 50. The check at issue

in the case at bar was not signed by the Petitioner and at best can be construed as a loan or a conditional promise to pay at some future date. Further, Krown was decided before Williams and, in light of the broad holding in that case, even a certified check might have been determined to be outside of the reach of the statute in question.

The lower court's reliance on several court of appeals cases to buttress its narrow reading of Williams is equally unpersuasive. None of them involve the application of Williams to the issue of whether a check can be considered a factual assertion. United States v. Price, 763 F.2d 640 (4th Cir. 1985), involved credit card receipts which were presented to a bank for the extension of credit. In United States v. Bonnette, 781 F.2d 357 (4th Cir. 1986),

credit was extended by a bank upon deposit of sight drafts to which titles representing the fictitious sales of cars had been attached. United States v. Tucker, 773 F.2d 136 (7th Cir. 1985), cert. denied, 106 S.Ct. 3338 (1986), involved forged documents purportedly representing that commodities had been transferred to a middleman. Likewise, in United States v. Prushinowski, 562 F.Supp. 151 (S.D.N.Y. 1983), aff'd mem., 742 F.2d 640 (4th Cir. 1985), the alleged fictitious documents were fictitious financial statements and fictitious sight drafts which were sold, at a discount, to the bank.

Given this Court's clear and unequivocal statement in Williams that a check is not a factual assertion and therefore cannot be the basis for a federal prosecution under 18 U.S.C.

Section 1001 and 1014, and given the rule of construction that conduct prohibited by a criminal statute is to be narrowly construed, Williams, 458 U.S. at 290, the Petitioner's conviction for violation of 18 U.S.C. Section 1001 cannot stand and must be reversed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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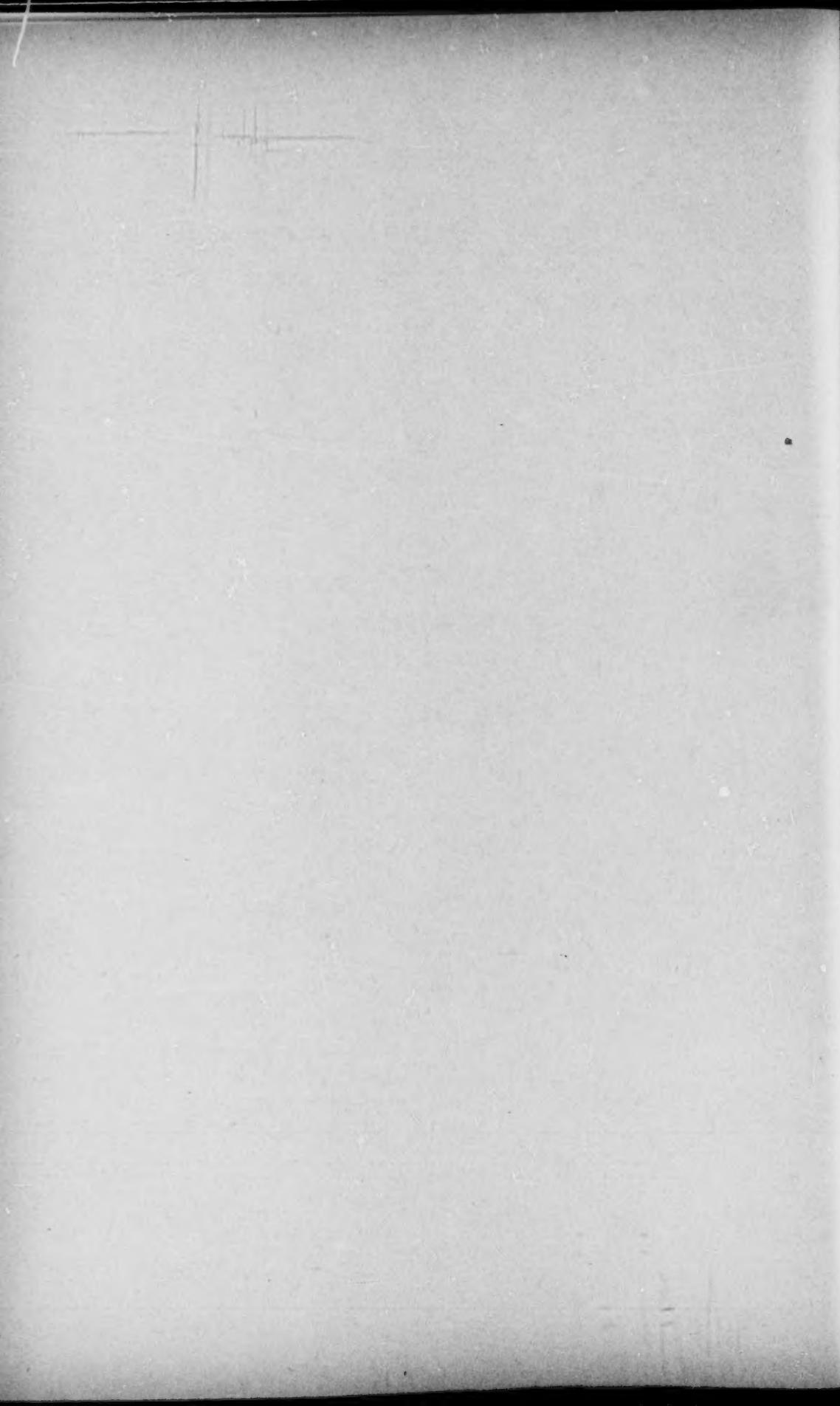
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September 1987



APPENDIX



UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1152—August Term 1986

UNITED STATES OF AMERICA.

Appellee.

—V.—

ROBERT WORTHINGTON.

Defendant-Appellant.

Before:

VANGRAAFEILAND, MESKILL, and CARDAMONE,
Circuit Judges.

Appeal from a judgment of conviction in the United States District Court for the Southern District of New York (Cannella, J.) for violation of 18 U.S.C. § 1001.

Affirmed.

KENNETH ROTH, Assistant United States Attorney, Southern District of New York (Rudolph W. Giuliani, United States Attorney, Southern District of New York, Helen Gredd, Assistant United States Attorney, Southern District of New York, of counsel), *for Appellee United States of America.*

HERBERT M. LEVY, New York, NY, *for Defendant-Appellant Robert Worthington.*

CARDAMONE, *Circuit Judge:*

Appellant was convicted upon a theory that naming a fictitious bank as drawee of a check constituted a "false statement". In common parlance a "bad check"—one drawn with insufficient funds in an account at the time—is not a "statement" subjecting the drawer to federal prosecution. The reason is that such a check may nonetheless be honored or may have been drawn negligently or even innocently. But the act of printing the name of a nonexistent drawee bank on a check fits squarely within the dictionary definition of "false statement". As such, it is not therefore similarly susceptible to an innocent explanation. Instead, like "Nye's sleeve stuffed full of aces", the act is done "with intent to deceive" and to euchre the victim out of his money. Bret Harte *Plain Language from Truthful James*, American Writers 232 (rev. ed. 1939).

Robert Worthington appeals from a conviction for making a false statement to a federal agency. The alleged "statement" was made on a check submitted to the

Internal Revenue Service (IRS). The check was drawn on a nonexistent bank. The prosecution proceeded on the theory that designating a fictitious bank as the drawee of a check was a representation that the bank did in fact exist. On appeal from a judgment entered in the United States District Court for the Southern District of New York (Cannella, J.) on December 19, 1986, appellant challenges this theory, arguing that a check cannot assert or represent anything and, therefore, is not a statement. Because we think that the designation of a nonexistent bank as the drawee of a check constitutes a "statement", we affirm the judgment of conviction.

BACKGROUND

The subject check was submitted to the Internal Revenue Service under the following circumstances. In 1981 Technassociates, Inc., a Washington, D.C.-based data processing and management consulting firm, was managed by its two principals, Peter Ythier and Marvin Zentner. In June of that year the company was experiencing serious cash flow problems arising, in part, from \$134,000 in taxes due and owing to the IRS. Ythier and Zentner contacted Worthington—the head of American Internax Planning—to discuss obtaining a line of credit. Zentner, Ythier, and Worthington arranged for Internax Planning to assist Technassociates in obtaining a line of credit as well as advancing \$134,000 to meet the tax liability. Internax Planning's fee was to be \$19,000.

As a step towards providing these services, on July 1 two associates of Internax Planning were dispatched from New York City to Washington carrying a letter of introduction signed by Worthington. After examining the

financial records of Technassociates, they accepted a check for \$2,200 as a down payment on the previously contracted for fee. In a telephone conference, Ythier and Worthington agreed to meet in New York on July 2. In the meanwhile—and also on July 1—an individual, who was not identified at appellant's trial, delivered over the counter in an IRS office in Manhattan a third party check in the amount of \$134,000. The following day, July 2, Ythier and Worthington met in New York. Worthington gave Ythier an IRS counter receipt showing that a third party check had been presented to the IRS in satisfaction of Technassociates' tax bill. Ythier gave Worthington two checks totalling \$16,800. Both men also signed a contract formalizing the agreement mentioned above.

Some weeks later Technassociates was faced with another tax liability, this time in the amount of \$94,600. Ythier again contacted Worthington who promised to provide the necessary funds in return for a fee of \$15,000. On July 27, an unidentified individual presented a check dated July 23 to the IRS in its Manhattan office in the amount of \$94,600. The payee was Technassociates; the drawer's signature was illegible. The check, drawn on the International Bank of San Antonio (Texas), contained the following notation on its reverse side:

This item represents a loan to Technassociates, Inc. to be paid to the IRS under conditions and agreements elsewhere determined. This item not to be deposited until three days from date.

The check was endorsed to the IRS by an unidentified endorser. A few days after that, Technassociates received

an IRS counter receipt from Internax Planning indicating that the IRS had received a check in satisfaction of its second tax bill.

Subsequently, during the fall of 1981, the IRS notified Technassociates that the first check had been drawn on an imaginary bank. When Ythier and Zentner called Worthington to complain, appellant responded that he had "abated" Technassociates' tax problem. Afterwards, the IRS notified Technassociates that the second check was also worthless because it too had been drawn on an imaginary bank.

On June 26, 1986 Worthington was indicted on three counts for his involvement in the submission of the two checks to the IRS. The first count alleged a violation of 18 U.S.C. § 1343, the federal statute proscribing wire fraud. The second and third counts based on alleged violations of 18 U.S.C. § 1001 are significant to this appeal. This statute makes illegal the submission of "any false writing or document" containing "any false, fictitious, or fraudulent statements" to a federal agency in connection with a matter within the jurisdiction of the agency. The second count was based on the July 1 tender of the \$134,000 check and the third count alleged the July 27 submission of the \$94,600 check in satisfaction of taxes owed by Technassociates.

Worthington was found not guilty on count one, the wire fraud charge. Although the jury was unable to reach a verdict on the second (\$134,000) count, it did find appellant guilty on the third (\$94,600) count, for which Worthington received a five year prison term and a \$10,000 fine.

DISCUSSION

A. Whether a Check Drawn on a Nonexistent Bank is a False Statement

The principal question raised on this appeal is whether the district court properly ruled that a check drawn on a nonexistent bank is a false statement within the meaning of § 1001. Appellant relies on *United States v. Elliott*, 689 F.2d 178 (10th Cir. 1982) (per curiam), which held that submission of a third party check—not backed by sufficient funds—to the Small Business Administration as payment on a loan was not a false statement within the meaning of 15 U.S.C. § 645(a). Inasmuch as *Elliott* rested entirely on the authority of *Williams v. United States*, 458 U.S. 279 (1982), *see* 689 F.2d at 180-81, reliance on *Elliott* simply brings into focus the question of whether *Williams* governs the present case. We now consider that question.

Williams involved a conviction under 18 U.S.C. § 1014 that proscribes, *inter alia*, knowingly making a false statement to a bank insured by the Federal Deposit Insurance Corporation (FDIC) in order to obtain credit. *Williams* was convicted essentially of check-kiting, that is, for writing checks unsupported by sufficient funds and depositing them in banks insured by the FDIC. In reversing his conviction, the Supreme Court stated first that the deposit of a check with insufficient funds did not represent the making of a false statement because “technically speaking, a check is not a factual assertion at all, and therefore cannot be characterized as ‘true’ or ‘false.’” *Williams*, 458 U.S. at 284. The Court also relied upon another equally important reason in reversing *Williams*’ conviction. It believed that Congress did not intend to

"make a surprisingly broad range of unremarkable conduct a violation of federal law." *Id.* at 286.

Worthington argues that *Williams* governs his conviction. We cannot agree. The rationale of *Williams*—that drawing a check unsupported by sufficient funds is neither a statement nor the type of conduct Congress aimed to criminalize—is simply inapplicable to the circumstances here. The Supreme Court first concluded that a check makes no representation as to the state of the drawer's bank account. *Id.* at 285. Here, of course, the check contains the name of a drawee "bank", which designates where the check may be presented for payment. Naming a bank is a representation that the bank upon which the check is drawn does in fact exist. Thus, unlike *Williams*, the assertion in the instant case constitutes a statement.

United States v. Price, 763 F.2d 640 (4th Cir. 1985), supports this conclusion. In *Price*, the court held that the credit card receipts with fictitious credit card account numbers, account owners, and amounts of purchase consisted of false statements. *Id.* at 643. Printing the name of a nonexistent bank on a check is analogous to the entry of a fictitious credit card account owner on a receipt because in each instance there is an averment that an obligor exists. Cf. *United States v. Bonnette*, 781 F.2d 357, 365 (4th Cir. 1986) (sight draft to which title representing a fictitious sale of a car had been attached represented that the car existed and that it had been sold for value); *United States v. Tucker*, 773 F.2d 136, 139 (7th Cir. 1985) (forged documents representing that commodities had been transferred to a middleman was a false statement), *cert. denied*, 106 S. Ct. 3338 (1986); *Prushinowski v. United States*, 562 F. Supp. 151, 157 (S.D.N.Y.), (check

made out to defendant and drawn by a fictitious drawer represented that an obligation was owed by the drawer to the defendant), *aff'd mem.*, 742 F.2d 1436 (2d Cir. 1983).

The Supreme Court also did not believe Congress meant to make this kind of "unremarkable conduct a violation of federal law." *Williams*, 458 U.S. at 286. Drawing a check on an illusory bank does not strike us as similarly unremarkable. Insufficient funding may have a perfectly innocent explanation, while the representation of a nonexistent bank may not. It is true that "many people understand a check to represent that the drawer will have sufficient funds deposited in his account by the time the check clears," or that, as the Supreme Court noted, "the drawer will make good the face value of the draft if it is dishonored by the bank." *Id.* at 286 n.7. But where there is a fictitious bank named as drawee, the drawer cannot—as in the case of a bounced check—make the check good either before or after an attempted presentation for payment. In the case at bar, the check in question was purportedly drawn by a third party. The very act of drawing such a check and scribbling an illegible drawer's name on it eliminates any possibility that it will ever be made good.

Further, a false statement is defined as one that is "more than merely untrue or erroneous", rather it implies that the "statement is designedly untrue . . . and made with intention to deceive the person to whom the false statement is made or exhibited." *Black's Law Dictionary* 725 (4th ed. 1968). For that reason, a check drawn on a knowingly fictitious bank at its inception is a false statement under § 1001. Thus, unlike checks drawn on insufficient funds, we see no reason why Congress would be reluctant to criminalize this sort of conduct.

Consequently, given the logic of *Williams* and analogous cases, we hold that the submission of a check drawn on a nonexistent bank is a representation that the bank exists and, as such, constitutes a false statement within the meaning of § 1001.¹ Thus, appellant's challenge to his conviction as not being a false statement fails.

B. Sufficiency of the Evidence

We turn now to Worthington's claim that his conviction is unsupported by sufficient evidence. Claims challenging the sufficiency of the evidence seldom succeed because a jury verdict must be sustained when there is substantial evidence, "viewed in the light most favorable to the government", to support it. *Burks v. United States*, 437 U.S. 1, 17 (1978); *Glasser v. United States*, 315 U.S. 60, 80 (1942); *United States v. Ferguson*, 758 F.2d 843, 855 (2d Cir.), *cert. denied*, 106 S. Ct. 592 (1985). The substantial supporting evidence test is satisfied when an appellate court upon reviewing the record concludes that any rational juror could have found that the essential elements of the crime charged were proved beyond a reasonable doubt. *United States v. Brown*, 776 F.2d 397, 402 (2d Cir. 1985), *cert. denied*, 106 S. Ct. 1793 (1986).

Worthington contends that there was insufficient evidence to prove that he either personally submitted or caused another to submit the \$94,600 check to the IRS.

¹ We agree with both parties that *Williams* may not be distinguished because it involved an indictment under § 1014 rather than prosecution under § 1001. But for the submission of the check to the IRS rather than a FDIC-insured bank, the appellant might have been prosecuted under § 1014. Cf. *United States v. Waechter*, 771 F.2d 974, 978-79 (6th Cir. 1985) (applying *Williams* in a case brought pursuant to 18 U.S.C. § 1010); *Elliott*, 689 F.2d at 180-81 (applying *Williams* in case brought pursuant to 18 U.S.C. § 645(a)).

Concededly, there is no direct evidence that appellant signed the fictitious check or submitted it since, as noted, the signature on the check was illegible, and the person who submitted it over the IRS counter was not identified at trial.

Yet, sufficient circumstantial evidence supports Worthington's conviction. Both Zentner and Ythier testified that Worthington agreed to make the \$94,600 payment to the IRS, and Ythier testified that he paid a fee to Internax Planning for this service. Further, Technassociates received the IRS counter receipt from Internax Planning shortly after Worthington agreed to make the payment to the IRS. Worthington claimed success in "abating" Technassociates' tax problem when questioned about the worthless check used for the earlier payment. Finally, an expert testified that it was likely that the check had been typed on a machine in Worthington's office.

As an alternate explanation, appellant contends that it was Ythier who submitted the check to the IRS. But there is no evidence suggesting that Ythier was in New York on the day the check was presented, and Ythier denied this allegation at the trial. Such an explanation presented a credibility issue which the jury resolved against appellant. As such, it is one that we will not disturb. *See United States v. Sprayregen*, 577 F.2d 173, 174 (2d Cir.), cert. denied, 439 U.S. 979 (1978); *United States v. Lamont*, 565 F.2d 212, 216 (2d Cir. 1977), cert. denied, 435 U.S. 914 (1978). In sum, Worthington's conviction is supported by sufficient evidence.

CONCLUSION

For the reasons stated above, the judgment of conviction is affirmed.

